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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LISA PARMET et al., Plaintiffs and Appellants, v. AL LAPIN, JR., et al., Defendants and Respondents.	B164170 (Los Angeles County Super. Ct. Nos. BC237443 and BC237885)
ANGEL PAWS, INC., Plaintiff and Appellant, v. AL LAPIN, JR., et al., Defendants and Respondents.	B168341

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles W. McCoy, Jr., Judge. Affirmed in part, reversed in part, and remanded.

Harris & Ruble and Alan Harris for Plaintiffs and Appellants Lisa Parmet, Barry Kingston, Barry Primus, Inc., and Angel Paws, Inc.

Law Offices of Ronald Jason Palmieri, Ronald Jason Palmieri, and Robert P. Wargo for Defendants and Respondents Al Lapin, Jr., Peter Lambert, Century Entertainment, and Entertainment 2000.

Anderson McPharlin & Conners, David T. DiBiase, Kathleen T. Marino, and Thomas J. Kearney for Defendants and Respondents Andrew Zucker, Steven Lowy, and Lowy & Zucker.

INTRODUCTION

This action arises out of the failed attempt to produce a motion picture. At issue here, plaintiffs and appellants Lisa Parmet, Barry Kingston, Barry Primus, Inc. (BPI), and Angel Paws, Inc. (Angel Paws) filed a complaint against financiers of the movie, defendants and respondents Al Lapin, Jr., Peter Lambert, Century Entertainment, and Entertainment 2000, and attorneys for the producers of the movie, defendants and respondents Steven Lowy, Andrew Zucker, and their law firm Lowy and Zucker, based on allegations of fraud and conspiracy. In case number B164170, Parmet, Kingston, and BPI appeal from the dismissal following sustaining of demurrers without leave to amend in favor of all respondents. We affirm the dismissals as to Parmet and Kingston, but reverse as to BPI and remand for further proceedings.

Having survived demurrer, Angel Paws then faced summary judgment motions brought by both sets of respondents. The trial court granted summary judgment in favor of the respondents, finding no triable issues of material fact regarding respondents' participation in a conspiracy to defraud Angel Paws. In case number B168341, which we ordered consolidated with B164170, Angel Paws

appeals from the granting of summary judgment in favor of both sets of respondents. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Allegations in the Operative Complaint

"In reviewing a judgment of dismissal after a demurrer is sustained without leave to amend, we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) Both consolidated appeals in this matter concern only the fifth cause of action for fraud of the operative third amended complaint.[1] The following facts are taken from the operative complaint, unless otherwise indicated.

Plaintiffs and appellants Parmet, Kingston, BPI, and Angel Paws were employed in the attempted production by My Left Hook, LLC (MLH), of a motion picture to be entitled "Out On My Feet" (the Movie).[2]

Defendants and respondents are Al Lapin, Jr. and Peter Lambert, and the entities through which they did business, Entertainment 2000 and Century Entertainment, LLC (collectively, the Lapin respondents), and Andrew Zucker,

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[1] The third amended complaint added for the first time the Lapin respondents as defendants to the first and second causes of action for breach of contract and unfair business practices. The Lapin respondents' demurrer to the first and second causes of action was unopposed by plaintiffs.

[2] Parmet was hired as a costumer, Barry Kingston as construction coordinator, and Primus, through his corporation BPI, as the director. Primus (as an individual) was also one of the people who controlled the rights to the screenplay. Plaintiff Angel Paws, Inc. (Angel Paws) is a corporation that "loans out" the services of Waldemar Kalinowski, who was to be the production designer for the movie.

Steven Lowy, and the law firm of Lowy & Zucker (collectively, the Zucker respondents).

Lapin, prior to 1997, had established a reputation as a successful entrepreneur. He purportedly founded the International House of Pancakes restaurant chain and thereafter sold it for millions of dollars. Unbeknownst to plaintiffs, Lapin had filed for chapter 7 bankruptcy prior to 1997 and no longer had substantial assets or a substantial credit rating. Respondent Lambert knew about Lapin's prior substantial wealth and excellent credit rating, and also about his bankruptcy. The remaining defendants and plaintiffs did not learn of Lapin's bankruptcy, diminished credit rating, and lack of assets until some later time.

Lambert allegedly had a substantial background in the field of financing motion pictures, having been a high ranking officer of several financial institutions, including Imperial Bank, which are engaged in the business of providing financing by way of loans to motion picture producers. Lapin and Lambert formed a partnership for the purpose of "earning commissions and fees" by "arranging for financing of motion pictures." The partnership conducted business using the names Entertainment 2000 (E2K) and Century Entertainment, LLC.

Respondents Zucker and Lowy are attorneys and partners in the law firm of Lowy & Zucker, which was retained by the producers of the Movie (who are discussed below) to represent them in connection with production of the Movie and formation of MLH.

Other people and entities who are named as defendants in the operative complaint, but who are not parties to the appeal, include: David Pritchard (one of the producers), Steve Ecclesine (not named as an individual defendant, but Pritchard's partner and a co-producer), and Pritchard/Ecclesine, Inc. (PEI); J. Stanton Dodson and Stanley Wakefield (the executive producers), and Empirical Pictures, Inc. (Empirical) (a wholly owned subsidiary of Global Medianet, Inc.)--

Empirical was formed by Dodson and Wakefield to produce independent motion pictures.[3]

The screenwriters of the Movie are Larry Golin (and his company, Mad Gypsy, Inc.) and Vinny Curto. The screenplay is based upon a story by Golin, Curto, and Primus.

In early 1997, Lapin and Lambert represented to Pritchard and Ecclesine that they were interested in and capable of providing financing for the production of "filmed entertainment projects." They deliberately created and fostered the false impression that it would be advantageous to Pritchard and Ecclesine to deal with them because Lapin, either through use of his own purportedly very substantial assets or by pledging his assets as security or collateral for a loan, could and would, if necessary, secure at least gap financing for films, which would enable the projects to go forward while more conventional forms of financing were being sought. Alternatively, he was capable of and would, if necessary, supply permanent financing either from his own assets or by pledging his assets as security or collateral for a loan.

Lapin and Lambert created this false impression knowing that Pritchard and Ecclesine were seeking to associate with other persons and entities to finance their proposed film project, and intended and expected that the fiction concerning the wealth of Lapin would be repeated and relayed to other persons and entities and relied upon by them. Lapin and Lambert did so intending that any production company eventually formed by Pritchard and Ecclesine or through their participation would be more likely to engage the services of Lapin and Lambert

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[3] At times we will refer to the defendants as a whole, rather than to only respondents, when discussing the allegations of the third amended complaint.

because of the belief that they could secure at least gap financing by using and/or pledging Lapin's supposedly extensive assets.

Primus purportedly was friends with Robert De Niro. Appellants alleged that defendants believed securing Primus's services as director would enhance the chances of hiring De Niro to act in the film, which would enhance the chances of securing financing for the film.

In early 1997, Wakefield and Dodson communicated with Pritchard and Ecclesine regarding the possibility of the four of them producing filmed entertainment projects. They did not form MLH until June 1997, but they used the name MLH as early as April 1997 in negotiating with prospective participants and investors in the production of the Movie. Wakefield, Dodson, and Pritchard agreed that Wakefield and Dodson would acquire the rights to the screenplay of the Movie and contribute them to MLH when it was formed. Wakefield and Dodson had been negotiating with Golin since early 1997 to acquire the motion picture rights to the screenplay of the Movie.

On or about May 8, 1997, Lapin, Lambert, Ecclesine, Pritchard, Wakefield, Dodson, Golin, Primus, and Josh Silver (Primus's agent) met. As of that date, Ecclesine and the defendants knew that in order to secure a commitment from De Niro to appear in the film, to secure a commitment from Primus to direct the film, and to induce the owners of the screenplay to grant any interest in it to defendants or any company formed by them, that it was necessary that De Niro, Primus, and Golin be convinced that the necessary financing for the production of the Movie was assured.

With said knowledge, intent, and expectation that all persons present at the meeting would rely on defendants' representations and repeat them to De Niro, who would rely on them, defendants represented to those at the meeting that they were capable of and committed to supplying the financing for the Movie, and that

Lapin was a multimillionaire who would finance the Movie either from his personal assets or from a bank loan to be guaranteed by him. The truth, however, which defendants knew but did not reveal, was that neither Lapin nor the other defendants had the capability of financing the production of the film. Thereafter, through numerous communications, defendants continued to communicate to Primus, Golin, and others that the defendants had sufficient resources to guarantee financing of the project. The defendants knew these representations were false but nevertheless, pursuant to an agreement among the defendants to defraud the plaintiffs, conspired with one another to withhold material information from the plaintiffs with respect to financing. Plaintiffs acknowledged they were uncertain exactly when Ecclesine and each of the defendants joined the conspiracy.

At the May 8, 1997 meeting, Lapin and Lambert represented that Lapin possessed sufficient assets and credit that he could finance the entire budget of the film from his own assets or by pledging his assets to guaranty a loan to the production company which was to be formed in the near future. Lapin's and Lambert's true intent was to act as brokers in order to secure a substantial commission for themselves.

On or about May 8, 1997, Pritchard, acting on behalf of Ecclesine, PEI, Dodson, Wakefield, Empirical, and Global, and Lapin, acting on behalf of Lambert, Century Entertainment, and E2K, executed a memorandum of understanding regarding the participation of E2K in financing the Movie. The memorandum of understanding stated that E2K "shall act as Financier on the above project on terms and conditions as delineated in the agreement between the parties relative to the Black & White project and the Family Dinners project with the exception that the fee to [E2K] shall be 1.75% of all funds raised." E2K was granted a 20 percent ownership interest in the project, and "will take the lead in funding an advance against any funds it may provide in the amount of up to

$100,000.00 to cover miscellaneous pre-production expenses of the kind and nature normally anticipated in first-rate theatrical motion pictures."

Lapin and Lambert had actual knowledge that the people associated with the proposed production, including Ecclesine, Pritchard, Dodson, Wakefield, Primus, Curto, Golin, and De Niro, had at least a general understanding of Lapin's previous substantial wealth, and that such people were ignorant of the fact that Lapin had gone through a chapter 7 bankruptcy and no longer possessed sufficient assets or credit to directly finance the production of the film.

Lapin, Lambert, Pritchard, PEI, Dodson, Wakefield, Empirical, and Global knew from May 8, 1997, onwards that they had not yet secured the financing necessary to produce the Movie but represented to those with whom they dealt that full financing for the film was assured, which representation they knew to be false.

MLH and the screenwriters, Golin, Curto, and Primus, executed an option agreement which states that it is "dated as of May 8, 1997."[4] Paragraph 1(a) of the agreement states that Owner (Golin, Curto, and Primus) grant to Purchaser (MLH), for monetary consideration, "the sole, exclusive and irrevocable option ('Option') to purchase all motion picture, television, and certain allied and incidental rights . . . in all languages throughout the universe in perpetuity in and to the Property [the screenplay of the Movie]. The Option shall be exercisable at any time commencing on May 8, 1997 and continuing until the earlier of October 7, 1997 or when Purchaser has secured the financing for the Picture, but in no event later than when principal photography commences ('Initial Option Period'). . . . The Option may only be exercised on or before the expiration of the Initial Option Period by written notice . . . given to Owner and provided the following has occurred:

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[4] The Lapin respondents point out that a footer at the bottom of each page shows the document was created or executed on or after July 2, 1997, which would have been after the formation of MLH in June 1997.

Purchaser has secured the financing for the Picture for a sum of at least Seven Million Dollars ($7,000,000) pursuant to a firm and binding written agreement . . . ." Paragraph 16 states the agreement "supersedes and replaces all agreements (oral or written) relating to the Property . . . ."

Appellants alleged that in obtaining the option, defendants represented to Mad Gypsy, Golin, Curto, and BPI that they had available adequate financing to complete the Movie, and had the latter not labored under that belief they would not have granted an option. The representation concerning the existence and availability of adequate financing was made by the defendants with the intent and expectation not only that the persons who controlled the rights to the screenplay would rely upon such representations, but also with the further intention and expectation that the representations would be repeated and spread throughout the film industry, inducing the plaintiffs to seek and accept employment in the production of the Movie.

On or about May 7, 1997, Pritchard and Ecclesine sent to Lapin and Lambert a memorandum requesting "a letter of commitment from your bank." Lapin and Lambert secured from Imperial Bank a letter, dated May 8, 1997, expressing the bank's "interest in considering your project subject to [certain enumerated conditions]. This letter is not intended to constitute a commitment to lend on the part of Imperial Bank."

On or about June 18, 1997, Pritchard, Ecclesine, PEI, Empirical, Wakefield, Dodson, and Global (i.e., the producers and the executive producers) formed MLH, "through which entity the [Movie] will be financed." PEI was obligated to contribute $8.5 million in cash or contractual guarantees, and Empirical was required to contribute the rights to the screenplay and a commitment by De Niro to appear in the film.

On or about June 30, 1997, Pritchard, Lapin, and Lambert met with Primus and De Niro. Pritchard, Lapin, and Lambert represented to Primus and De Niro that Lapin was capable of financing and would finance the Movie. The defendants intended and expected that these representations would induce Primus and De Niro to justifiably rely on the representations, to their detriment and injury, and also to repeat the representations to others who were interested in or might become interested in the Movie, including the plaintiffs. The representations were repeated to and relied upon by the plaintiffs. The primary purpose of the meeting was to assure De Niro and Primus that MLH had the necessary funding to complete the Movie. Lapin and Lambert knew at the June 30, 1997 meeting that Lapin's actual financial condition was such that he could not finance the production of the Movie through use of his own assets or credit, but Lapin and Lambert continued with the pretence that Lapin was a man of such wealth that he could and would personally finance the film.

Lapin and Lambert had actual knowledge that De Niro would contract to appear in the film only if convinced that financing for the film would actually fund prior to filming his scenes, and that his contracting with MLH would require that Primus be the director. Further, if Primus entered into the standard Directors Guild of America (DGA) contract with MLH, Primus would be the person, subject to approval by the producers, to select the principal members of the production team.

On or about July 18, 1997, MLH executed a written contract with De Niro for him to appear in the Movie for compensation of $1 million; MLH was obligated to pay De Niro whether or not he made the film. The contract stated the Movie would be budgeted at approximately $10 million.

On or about July 25, 1997, MLH entered into a written contract with BPI to secure the services of Primus as director, which obligated MLH to pay BPI a minimum of $250,000 to direct the Movie.

Defendants intended and expected that the existence of the De Niro and Primus contracts and the terms thereof, including the compensation provided therein, would be announced and broadcast throughout the motion picture industry, giving the appearance that MLH had the capital and/or financing necessary to produce the Movie and to meet the $10 million budget. The existence of the contracts was in fact announced throughout the industry, coming to the attention of persons who later accepted employment in the Movie, including plaintiffs.

Avalon Payroll Services and Axium Payroll Services were engaged by MLH in August 1997 to furnish payroll processing services. They were "joint employers" and "employers of record," supplying workers' compensation insurance and unemployment compensation insurance for those hired by MLH to work on the Movie. People employed to work on the Movie executed "start forms" which named Avalon as the employer.

On or about August 14, 1997, Pritchard on behalf of MLH executed an agreement with Overseas Film Group, Inc. (OFG) under which the latter agreed to provide funds for the Movie, but OFG had one year within which to raise and provide such funds. On the same date, Zucker wrote to OFG advising that MLH was presently in need of $150,000 to $250,000 to meet preproduction expenses through the end of August.

On or about August 14, 1997, MLH agreed to contract with Angel Paws for the services of Waldemar Kalinowski to act as production designer for the Movie. It was understood that Kalinowski would be responsible for recruiting many in the production crew to work on the film. To induce Angel Paws to enter into the agreement and to commence recruitment of the production crew, Ecclesine, on or about August 14, 1997, represented to Kalinowski that financing for the Movie was assured. Such representation was made with the intention and expectation that Kalinowski and Angel Paws would rely upon the representation and would repeat

it to the prospective production crew members. The representation was relied upon by Kalinowski, and was repeated to those who he recruited to work on the film.

On or about September 19, 1997, appellant Parmet accepted employment with MLH as a costumer for the Movie. On or about September 29, 1997, appellant Kingston accepted employment with MLH as construction coordinator for the Movie. In accepting employment with MLH, Parmet and Kingston justifiably relied upon the appearance created by defendants that MLH was a legitimate, properly capitalized production company with adequate financing to complete the Movie.

Previously, on or about August 22, 1997, the Directors' Guild of America (DGA) communicated with Zucker, requesting information regarding MLH and also as to the chain of title for the screenplay, including registering the copyright. Zucker responded on August 26, 1997, by sending the DGA the articles of organization and the operating agreement for MLH, and stating that the chain of title documents would follow. Defendants authorized these representations by Zucker, knowing they owned only an option to acquire the screenplay, and intending that it would allay DGA's concerns and prevent DGA from alerting Primus that he could not participate in the Movie unless and until MLH exercised its option to acquire the screenplay and provided satisfactory evidence of its financial ability to complete the Movie.

On August 15, 1997, Zucker wrote to the DGA, enclosing documentation for the purpose of making MLH a signatory member of the DGA, as required to enable Primus to direct the Movie. In so doing, MLH represented, among other things, that it would sign the DGA documents covering the film work; that the budget for the Movie was $8,500,000; that the director would be Primus; that the start date for photography was October 21, 1997; that the financing for the budget was to be provided by PEI (50 percent) and Empirical (50 percent); that the completion bond

company was Film Finances, Inc; that MLH owned the rights to the underlying material; and that the attorney for MLH was Zucker. The representations that MLH owned the rights to the underlying material and that financing was in place were false and known to be false by defendants. MLH lacked the funds to exercise the option and had no reasonable prospect of acquiring such funds prior to the scheduled commencement of filming on October 20, 1997. The representations were made with the intention that the DGA would believe them, would permit production to go forward, and would not alert Primus and other DGA members to the true facts. The DGA was acting as an agent for BPI/Primus and as such misrepresentations to the DGA were misrepresentations to Primus.

On August 18, 1997, the DGA received a security agreement by which MLH granted the DGA a security interest in MLH's ownership of the copyrights to the underlying material, thereby representing that MLH was the holder and owner of all copyrights in the screenplay. The security agreement was sent to the DGA, acting as agent for BPI, in furtherance of defendants' conspiracy to defraud BPI/Primus and the other plaintiffs into continuing to work on the Movie. On October 14, 1997, the DGA wrote to Zucker, requesting a "Receipted Form PA." Attached to the third amended complaint are the facsimiles exchanged by the DGA and defendants in response, including a financing statement filed with the office of the California Secretary of State.

On September 12, 1997, Zucker wrote a memorandum to his file stating that financing was not yet available and that he had suggested to Pritchard that filming be delayed until June 1998 to enable financing to be obtained and to enable De Niro to accept two other offers which conflicted with his commitments to MLH, to minimized MLH's exposure to De Niro. On September 19, 1997, Zucker wrote to Pritchard, stating: "You informed me of the potential of not having the funds to finance the picture, and I would like to do everything I can do [to]

minimize the LLC's liability by, for example, not sending out formal contracts to the actors, avoiding verbal misrepresentations, etc." Accordingly, Zucker, Pritchard, Ecclesine, and the other defendants determined to continue to hide the true financial condition from the plaintiffs and others working on the project.

The Lapin respondents intended to convince Ecclesine, Pritchard, Dodson, Wakefield, MLH, and Primus that it was not necessary to seek other sources of financing for the film and, in so doing, to cause them to rely completely upon the Lapin respondents to provide financing. In fact, the Lapin respondents intended to pursue conventional financing for the film, in order to secure for themselves a commission for obtaining financing. The Lapin respondents knew it was crucial to the success of this scheme that Ecclesine, Pritchard, Dodson, Wakefield, MLH, and Primus not become aware of the true facts until MLH had embarked on preproduction of the film and was in a position such that, having foregone all other sources of financing for the film, it had no choice but to rely on the Lapin respondents to provide the necessary financing.

In making the alleged representations and concealing the true facts concerning the financial condition of Lapin and their true role in obtaining financing, Lapin and Lambert acted with the knowledge, intention, and expectation that the substance of their representations and the misleading picture painted as to the financial condition of Lapin and his intention and ability to provide at least gap financing from his own assets or pledge of his assets would be conveyed to the persons and entities hired by MLH to produce the film, including each plaintiff. The substance of such representations and the misleading picture concerning Lapin's financial condition and intentions were so conveyed to such persons, including plaintiffs, and were relied upon by them to their detriment in accepting employment in a production they erroneously believed to be assured of adequate financing. Plaintiffs allege that all of the other defendants knew from May 8,

1997, onwards that they had not yet secured the financing necessary to produce the Movie.

When MLH and its members and Zucker agreed to embark on the venture of attempting to produce the Movie, they each recognized that their only hope of realizing any profit lay in completing the production and having the Movie distributed and exhibited. Since they were unable and/or unwilling to capitalize the production, they concluded that their only hope of successfully completing the production lay in obtaining financing from others. They agreed amongst themselves that they would further the venture by issuing statements and making representations which falsely portrayed the production as being fully financed, hoping that by creating the illusion of financial stability, they would attract persons and entities willing to provide financing and would be able to attract the necessary production personnel to at least commence producing the film. At some point, Pritchard, Ecclesine, Dodson, Wakefield, and Zucker learned that the Lapin respondents were incapable of providing cash for the production or of using their assets to guarantee a loan to complete the production. Rather than revealing the true facts, Pritchard, Ecclesine, Dodson, Wakefield, Zucker, Lapin, Lambert, Century Entertainment, and E2K affirmatively conspired to further the venture by issuing statements and representations which falsely portrayed the production as being fully financed, to conceal the truth from plaintiffs. The exact dates on which Pritchard, Ecclesine, Dodson, Wakefield, and Zucker learned that financing was not assured by Lapin is unknown to plaintiffs but is known by these defendants. Each of the false and misleading representations made by Zucker and the promoters was made pursuant to this common plan, scheme, and design.

Not later than May 8, 1997, all defendants knew MLH could not succeed in producing the Movie without outside financing, that none had been obtained, and that the promoters were nevertheless representing that full financing was assured, a

statement they knew to be false. Rather than disassociating himself from the enterprise or taking steps to insure the promoters were not practicing a fraud, Zucker, in order to protect his potential profit, made a conscious determination to join with the promoters in misrepresenting the financial condition of MLH.

During July 1997, the promoters and Zucker became aware of the contracts between MLH on the one hand, and De Niro and Primus on the other, and were aware that filming of scenes involving De Niro had to commence by October 20, 1997. They were also aware the option on the screenplay had not been exercised and they could not begin filming until it was exercised; they knew MLH did not have the funds to do so and had no reasonable prospect of obtaining funds.

Nonetheless, Zucker elected to communicate with the DGA and the Screen Actors Guild, knowing that the statements he made were false, but hoping to thereby secure additional time to secure financing. Zucker thereby knowingly and intentionally became an active part of the conspiracy to defraud originated by the promoters and, through his continued active participation in the conspiracy, became equally liable with the promoters for the frauds perpetrated by them as well as for his own misconduct.

Paychecks were due to be given to plaintiffs on October 9, 1997, but were not issued because MLH did not have the funds to pay them. On October 10, 1997, Pritchard called a meeting of the production crew and stated that full financing for the production would be forthcoming within a week, and those production crew members who remained on the job would be paid a bonus, and would thereafter receive regular paychecks, including those due on October 9, 1997. Pritchard said Lapin had been the main investor in the production, but that he had cancer and his family did not want to release the funds. It is further alleged that when Pritchard made these statements he and the defendants knew that Lapin did not have cancer, and they had no commitment to obtain financing in one week.

Plaintiffs believed and relied upon Pritchard's representations and continued to work until October 17, 1997, when the production was shut down. Had defendants revealed that they had no firm commitment for financing, plaintiffs would not have agreed to continue working.

On or about October 17, 1997, MLH had no funds and was compelled to and did shut down the production, leaving plaintiffs unpaid for the services which had been rendered and the goods which had been supplied. Thereafter, BPI initiated arbitration proceedings against MLH, as required by the director contract, and received an award, no portion of which has ever been paid. On or about August 4, 1998, MLH filed a voluntary petition under chapter 7 of the Bankruptcy Code.

2. The Demurrer

The Lapin respondents and the Zucker respondents filed demurrers to the third amended complaint. Plaintiffs filed opposition to the demurrers. Defendants in turn filed replies to the opposition.

After hearing argument, on October 7, 2002, the trial court filed a statement of decision regarding the Lapin respondents' and the Zucker respondents' demurrers to Parmet, Kingston, and BPI's third amended complaint. As to Parmet and Kingston, the court noted they merely alleged that they "'justifiably relied upon the appearance created by Defendants that MLH was a legitimate, properly capitalized production company with adequate financing to complete the Production.'" The court sustained the demurrer without leave to amend because "[a]n 'appearance' does not amount to a misrepresentation. Moreover, Plaintiffs[] have made only conclusory allegations that misrepresentations were relied on by Lisa Parmet and Barry Kingston, in accordance with Defendants' plan. Consequently, the TAC fails to state a cause of action for fraud as to Parmet and Kingston."

As to BPI, the court sustained the demurrer without leave to amend, in keeping with its finding on the Lapin respondents' previous motion for judgment on the pleadings, on the basis that language in the option contract signed by BPI demonstrated that at the time it was executed, financing was not in place, and thus BPI could not have reasonably relied on any prior statements that the film was financed by Lapin, Lambert, E2K, and/or Century Entertainment in contracting to work on the Movie. BPI's argument that actionable misrepresentations continued to be made on August 15, 1997, and September 15, 1997, was irrelevant, in the court's view, because BPI contracted well before August 15, 1997, to work on the film and BPI did not rely on subsequent misrepresentations in contracting to work on the film. Plaintiffs had countered that it was irrelevant whether BPI knew the film was not properly funded because the language of the option contract suggests BPI agreed to work on the film in reliance on the misrepresentation that Lapin would provide funds when needed. The court held, however, that the language of the option contract merely established that funding was not in place.[5]

As to Angel Paws, the third amended complaint alleged Lowy and Zucker were liable as coconspirators for Ecclesine's alleged misrepresentation to Angel Paws that funding was in place. Plaintiffs alleged Lowy and Zucker possessed actual knowledge on or before May 8, 1997, that the film lacked adequate outside financing, and knew that the promoters falsely represented the film was fully financed, but decided to join the promoters in misrepresenting the film's financial stability. The court found these allegations sufficient to maintain a cause of action for fraud.

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[5] In addition, the court dismissed plaintiffs' first cause of action for breach of contract and second cause of action for unfair business practices, based upon plaintiff's assertion that they would not proceed on those causes of action.

In addition, the third amended complaint alleged Lapin and Lambert were coconspirators along with Ecclesine in misrepresenting, on or before August 14, 1997, that funding was in place for the film, and in reliance on that misrepresentation Angel Paws contracted to work on the film. The court found these allegations sufficient to survive demurrer.

Judgments of dismissal as to Parmet, Kingston, and BPI were filed by the Zucker respondents and by the Lapin respondents in November 2002. Notices of appeal were filed in December 2002.

DISCUSSION

B164170

I. Dismissal as to Parmet and Kingston

A. Statements Allegedly Made by the Lapin Respondents

"'The elements of fraud . . . are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 676, p. 778; see also Civ. Code, § 1709; *Hunter* [*v. Up-Right, Inc.* (1993)] 6 Cal.4th 1174, 1184; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1108 . . . .)

"'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. (*Union Flower Market, Ltd. v. Southern*

California Flower Market, Inc. (1938) 10 Cal.2d 671, 676 . . . ; see Civ. Code, § 1710, subd. (4); 5 Witkin, Summary of Cal. Law, *supra*, § 685, pp. 786-787.)

"An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract. (*Chelini v. Nieri* (1948) 32 Cal.2d 480, 487 . . . ['tort of deceit' adequately pled where plaintiff alleges 'defendant intended to and did induce plaintiff to employ him by making promises . . . he did not intend to (since he knew he could not) perform' (fn. omitted)]; *Kuchta v. Allied Builders Corp.* (1971) 21 Cal.App.3d 541, 549 . . . , citing *Horn v. Guaranty Chevrolet Motors* (1969) 270 Cal.App.2d 477, 484 . . . ; *Squires Dept. Store, Inc. v. Dudum* (1953) 115 Cal.App.2d 320, 323 . . . .)" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

Respondents attack appellants' complaint on the grounds that it (1) failed to adequately allege (with regard to Parmet and Kingston) that misrepresentations were made, and (with regard to all appellants), (2) that the complaint failed to allege justifiable reliance, or (3) resulting damage.

The trial court ruled that Parmet and Kingston merely alleged that they "'justifiably relied upon the appearance created by Defendants that MLH was a legitimate, properly capitalized production company with adequate financing to complete the Production.'" The court sustained the demurrer without leave to amend because "[a]n 'appearance' does not amount to a misrepresentation." In addition, the court found Parmet and Kingston made only "conclusory allegations" that they relied on the misrepresentations, in accordance with defendants' plan.

The Lapin respondents assert that Parmet and Kingston do not allege anyone represented to them that financing for the film was secured, that Lapin was a multi-millionaire, or that Lapin had agreed to finance the production from his own assets or by guaranteeing a loan secured by his own assets.

The allegation to which the trial court makes reference stated that in accepting employment with MLH, Parmet and Kingston justifiably relied upon the appearance created by defendants that MLH was a legitimate, properly capitalized production company with adequate financing to complete the Movie.

We note that the plaintiffs additionally alleged that Pritchard, Lapin, and Lambert met with Primus and De Niro on June 30, 1997, and represented to them that Lapin was capable of financing and would finance the Movie, either directly or through a pledge of his assets and credit, and that these representations were made with the intention they would be relied upon by De Niro and Primus and with the intent and expectation that they would be repeated to and relied upon by others who were interested in or might become interested in the Movie, including the plaintiffs, and that the representations were so repeated to and relied upon by the plaintiffs.

Moreover, appellants alleged that in making the alleged representations and concealing the true facts concerning the financial condition of Lapin and their true role in obtaining financing, Lapin and Lambert acted with the knowledge, intention, and expectation that the substance of their representations and the misleading picture painted as to the financial condition of Lapin and his intention and ability to provide at least gap financing from his own assets or pledge of his assets would be conveyed to the persons and entities hired by MLH to produce the film, including each plaintiff, and the substance of such representations and the misleading picture concerning Lapin's financial condition and intentions were so conveyed to such persons, including plaintiffs, and were relied upon by them to their detriment in accepting employment in a production they erroneously believed to be assured of adequate financing.

We conclude that the foregoing allegations, that misrepresentations were made indirectly to Parmet and Kingston, were not sufficiently specific to withstand

demurrer. Plaintiffs alleging fraud must plead their allegations with more detail than other causes of action. "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 74 . . . ; *Nagy v. Nagy* (1989) 210 Cal.App.3d 1262, 1268 . . . ; 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 662, pp. 111-112.) 'Thus "'the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.'" [Citation.] [¶] This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered."' (*Stansfield, supra,* 220 Cal.App.3d at p. 73, italics in original.)" (*Lazar v. Superior Court, supra,* 12 Cal.4th 631, 645.) Simply put, the complaint fails to state how, when, where, and by what means the representations were tendered to plaintiffs.[6]

It is true that indirect reliance may be actionable if defendants had reason to know others would convey their misrepresentations to plaintiffs. (*Murphy v. BDO Seidman* (2003) 113 Cal.App.4th 687, 702.) As stated by the Supreme Court in *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1095: "The Restatement Second of Torts, section 533, articulates the relevant principle in this way: 'The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made

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[6] Appellants represent in their opening brief on appeal that if necessary, they would amend the complaint to "allege the specific representations repeated to appellants Parmet and Kingston, by whom they were repeated, when they were repeated and to allege the specific facts establishing that they accepted employment with MLH in justifiable reliance on such representations and that they continued to work on the film after the production company missed payrolls, only in light of the defendant's assurances to the workers that money was forthcoming." They do not, however, set forth in their brief the specific allegations with which they would propose to amend the complaint. The burden is on appellants to prove the trial court abused its discretion in sustaining the demurrer because there is a reasonable possibility the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636.)

directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transactions involved.' A few cases in this state expressly apply section 533 (*Varwig v. Anderson-Behel Porsche/Audi, Inc.* (1977) 74 Cal.App.3d 578, 581 . . . ; *Barnhouse v. City of Pinole* (1982) 133 Cal.App.3d 171, 191 . . . [additional citations predating section 533 omitted])." (See also *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 175: "[A]lthough many fraud cases involve personal communications, that has never been an element of the cause of action. (See *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 218-219 . . . [fraud perpetrated by misleading advertisements on nationally broadcast television shows].) Fraud can be perpetrated by any means of communication intended to reach and influence the recipient."; *Geernaert v. Mitchell* (1995) 31 Cal.App.4th 601; and *Murphy v. BDO Seidman, supra,* 113 Cal.App.4th 687.)

Appellants alleged that the Lapin respondents made the misrepresentations regarding Lapin's wealth and his intention to finance the Movie by using his own assets or pledging his assets as collateral for a loan, intending the representations would be repeated "throughout the film industry" in order to induce plaintiffs to accept employment in the Movie, with the knowledge, intention, and expectation that the substance of their representations would be conveyed "to the persons and entities hired by MLH to produce the film," including each plaintiff, and with the intention and expectation that they would be repeated to and relied upon by "others who were interested in or might become interested in" the Movie, including the plaintiffs.

We conclude that Parmet and Kingston failed to adequately allege that the representations were intended or expected to reach and influence them. The

alleged target audience, variously described as "the film industry," "persons . . . hired by MLH to produce the film," and "others who were interested" in the Movie, is too amorphous a group, and too remote from the Lapin respondents to form the basis for actionable fraud.

"[T]o be liable for actionable fraud the defendant must intend his representation (or concealment) be relied upon by a particular person or persons. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 707, p. 807.) However, it is also recognized that the defendant will not escape liability if he makes a misrepresentation to one person *intending* that it be repeated and acted upon by the plaintiff. [Citations.] Likewise, if defendant makes the representation to a particular class of persons, he is deemed to have deceived everyone in that class. (5 Witkin, *op. cit. supra,* § 708, at p. 808.)" (*Geernaert v. Mitchell, supra,* 31 Cal.App.4th 601, 605, italics in original.) Consistent with the rule requiring specificity in pleading fraud, however, a complaint must state ultimate facts showing that the defendant intended or had reason to expect reliance by the plaintiff or the class of persons of which the plaintiff is a member. (*Id.* at p. 608.)

"In its comments under the more general [Restatement Second of Torts] section 531, the ALI carefully distinguishes the concept of foreseeability with 'reason to expect,' making clear that the latter term bears more similarity to actual *intent* to cause third party reliance than it does to 'foreseeability.' 'Virtually any misrepresentation is capable of being transmitted or repeated to third persons, and if sufficiently convincing may create an obvious risk that they may act in reliance upon it. . . . *This risk is not enough for the liability covered in this Section. The maker of the misrepresentation must have information that would lead a reasonable man to conclude that there is an especial likelihood that it will reach those persons and will influence their conduct.*' (Rest.2d Torts, *supra*, § 531,

com. d, at p. 68, italics added.)" (*Geernaert v. Mitchell, supra,* 31 Cal.App.4th at p. 607.)

It is simply too much of a reach to say that the Lapin respondents made the alleged representations about Lapin's wealth and intention to provide at least gap financing from use or pledge of his own assets with the expectation or intention that the representations would eventually reach a costumer and a construction coordinator, in order to influence them to work on the Movie, when they would not otherwise have done so, particularly where as here the complaint fails to allege in what manner the representations purportedly reached them. (Cf. *Varwig v. Anderson-Behel Porsche/Audi, Inc., supra,* 74 Cal.App.3d 578 [plaintiff purchased car with defective title from wholesaler, who had purchased car from defendant car dealer; held defendant had reason to know wholesaler intended to resell the car, therefore misrepresentation as to title was indirect misrepresentation to plaintiff]; *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534 [sellers of home failed to disclose noise problem in written disclosure statement, duty of disclosure extended to plaintiff even though home actually sold by relocation management company, where original sellers had every reason to expect their disclosure statement would be delivered to plaintiff purchasers]; *Geernaert v. Mitchell, supra,* 31 Cal.App.4th 601 [real property purchasers could maintain action for fraud against two consecutive prior owners for concealment of structural defects].)

B. Statements Made by Alleged Coconspirator Pritchard

In addition, however, plaintiffs alleged that Pritchard stated at a meeting with the production crew on October 10, 1997, that financing would fund in one week, that Lapin had cancer and his family did not want to release his funds, and that anyone who stayed on to work would receive a bonus. As the Lapin respondents point out, the complaint does not specifically allege that Parmet and

Kingston were present at the October 10, 1997 meeting and heard Pritchard's statements. But they were members of the production crew, and their presence is indicated by the additional allegation that plaintiffs believed and relied upon Pritchard's representations and continued to work until October 17, 1997, when the production was shut down; had defendants revealed that they had no firm commitment for financing, plaintiffs would not have agreed to continue working.

These representations, made by Pritchard and not by the Lapin respondents, could form the basis for actionable fraud only on the theory that the Lapin respondents conspired with Pritchard in making the representations.

"'"The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. . . . In such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.'"' (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511, citations omitted.) "[T]he alleged facts must show either expressly or by reasonable inference that [defendants] had knowledge of the object and purpose of the conspiracy, that there was an agreement to injure the plaintiff, that there was a meeting of the minds on the objective and course of action, and that as a result one of the defendants committed an act that resulted in the injury." (*Schick v. Lerner* (1987) 193 Cal.App.3d 1321, 1328.)

The complaint is silent as to any of the elements required to allege a conspiracy among Pritchard and the Lapin respondents with regard to the statements made by Pritchard on October 10, 1997, particularly with regard to the course of action to be taken at that point. Pritchard's statements, that Lapin would *not* provide financing for the Movie because he had cancer, but that other financing

would fund in a week, were complete departures from the alleged representations that Lapin would fund the movie.

As such, the complaint fails to state a cause of action on behalf of Parmet and Kingston based on the alleged misrepresentations made by Pritchard on that date, particularly where as here the complaint fails to state a cause of action for fraud based on statements made directly by the Lapin respondents, and as to any intention or expectation by the Lapin respondents that Parmet and Kingston were to be recipients of any fraudulent misrepresentations.

For the same reasons described in the foregoing discussion, the complaint failed to adequately allege that the Zucker respondents, who were not alleged to have made any direct misrepresentations to Parmet and Kingston, were liable for fraud. The complaint fails to state any actionable fraud as to Parmet and Kingston upon which to base allegations of conspiracy by the Zucker respondents. As such, we affirm the dismissals in favor of the Lapin respondents and the Zucker respondents as to Parmet and Kingston.

II. Dismissal as to BPI/Primus[7]

A. The Lapin Respondents

1. Reliance

The complaint alleges with sufficient specificity that the Lapin respondents made, directly to Primus, the purported misrepresentations about Lapin's wealth and his ability and intention to finance the film if necessary, both in early May 1997 when meeting with regard to obtaining an option on the screenplay, and in

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[7] For ease of reference, we refer to Primus rather than BPI, with the understanding that BPI is the named plaintiff.

late June 1997 when the Lapin respondents met with Primus and De Niro. Unlike Parmet and Kingston, as to Primus the court sustained the demurrer without leave to amend based on its previous finding that the language of the option contract signed by Primus demonstrated that at the time it was executed, financing was not in place, and thus Primus could not have reasonably relied on any prior statements that the film was financed by the Lapin respondents in thereafter executing the contract to direct the Movie in late July 1997.[8]

However, the specific misrepresentation upon which Primus claims reliance was that Lapin could and would secure the financing by using his own assets or pledging his assets as collateral for a loan. Thus while Primus knew in May that financing was not formally in place, he had been promised in early May and late June that financing was assured and if necessary would be provided by Lapin himself, impliedly at least by the time production was to commence in October 1997.

In order to establish fraud, a plaintiff must show that the defendant made a false representation with the intent to induce the plaintiff to act to his detriment in reliance thereon. (See Civ. Code, § 1709.) In addition, "[p]laintiffs must show 'actual' reliance, i.e., that the representation was an '"immediate cause"' that altered their legal relations. (4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 472, p. 2732.) Besides actual reliance, plaintiff must also show 'justifiable'

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[8] The agreement at issue states that the option to purchase rights to the screenplay "shall be exercisable at any time commencing on May 8, 1997 and continuing until the earlier of October 7, 1997 *or when Purchaser has secured the financing for the Picture*, but in no event later than when principal photography commences." (Italics added.)

Thus, according to the trial court, Primus knew on or about July 25, 1997, when he executed a written contract with MLH to provide his services as director of the Movie, that financing had not been secured.

Nonetheless BPI alleged that in obtaining the option, defendants represented to the screenwriters and Primus that MLH had *available* adequate financing for the Movie.

reliance, i.e., circumstances were such to make it *reasonable* for plaintiff to accept defendant's statements without an independent inquiry or investigation." (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331-1332.)

We conclude that Primus adequately alleged reliance on the Lapin respondents' misrepresentations as to the availability of financing, both in executing the contract with MLH to direct the Movie, and in refraining from discontinuing performance under that contract, based on the assurance that financing was in essence guaranteed. (See *Small v. Fritz Companies, Inc., supra,* 30 Cal.4th 167, 174 [forbearance--the decision not to exercise a right or power--is sufficient to fulfill the element of reliance necessary to sustain a cause of action for fraud or negligent misrepresentation].)

As to whether Primus's reliance was justifiable, the Lapin respondents argue that, pursuant to Civil Code section 1624, subdivision (a)(7), a contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than $100,000, made by a person engaged in the business of lending or arranging for the lending of money or extending credit, must be in writing and subscribed by the party to be charged in order to be valid. Thus, without seeing proof in writing of a loan commitment, Primus's reliance on the Lapin respondents' representations was not justifiable. Respondents' argument in this regard is misplaced.

"'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact.' (*Blankenheim v. E. F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1475 . . . ; *Gray v. Don Miller & Associates, Inc*. (1984) 35 Cal.3d 498, 503 . . . ['[w]hether reliance is justified is a question of fact for the determination of the trial court']; *Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843 . . . ['the reasonableness of the reliance is ordinarily a question of fact'].)

'However, whether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts.' (*Guido v. Koopman*, *supra*, 1 Cal.App.4th at p. 843.)" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.)

We decline to hold as a matter of law that it was unreasonable for Primus to fail to insist that the parties to the purported loan commitment demonstrate their compliance with the statute of frauds. Indeed, the representation at issue was that a loan would be forthcoming whenever necessary, not that a loan had been formalized.

2. Damages

The Lapin respondents contend that under Primus's director contract with MLH, he was entitled to receive the sum of $50,000 prior to the commencement of principal photography. Respondents contend that he received $36,666.66 from MLH prior to the cessation of production. In addition, pursuant to an agreement of settlement with Avalon, he was awarded the sum of $13,333.33 and thus has been fully compensated for all services he provided. In this regard, the Lapin respondents request that we judicially notice documents in Los Angeles Superior Court case number BC188982, an action entitled *Angel Paws, Inc. v. My Left Hook, LLC, et al*., in which plaintiffs sued the entities with which MLH contracted to provide payroll services for the production. In addition, Primus received an arbitration award in his favor against MLH.

While we may take judicial notice of the court records in the actions described above, including the fact that an award in favor of Primus was entered, albeit against different parties, it is reasonably subject to dispute (see Evid. Code, § 451, subd. (f)) whether Primus actually received the amount awarded, and

whether or not the amount he has received constitutes all that he is due.[9] We do not take judicial notice of the truth of hearsay statements contained in declarations and so forth that are contained within the court records. (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.) We decline to find, on our review of the sustaining of demurrers, that Primus has already received all sums due to him, such that he may not pursue recovery for the alleged fraud committed by the Lapin respondents.

In addition, we reject the Lapin respondents' argument that the damages which plaintiffs seek ("to the extent of the compensation called for by such Plaintiff's contract with MLH which has not been paid") are merely contract damages which they are not permitted to recover in an action for fraud. The Lapin respondents' cite *Lazar v. Superior Court, supra,* 12 Cal.4th 631, for the proposition that damages recoverable for fraudulently inducing a plaintiff to enter into an employment contract did not include loss of anticipated income from the new job, because such damages are recoverable only on a contract claim. (See *Lazar, supra,* at pp. 648-649.) *Lazar* is simply inapposite, as it involved an action by a terminated employee against his employer. Here, the action is against third parties who allegedly induced plaintiffs to enter into contracts with MLH; it is not nor could it be an action for breach of contract.[10]

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[9] The Lapin respondents tacitly concede this point as to the award against MLH by stating that "Primus has obtained an arbitration award, which may be entered as a judgment in any court having jurisdiction, against MLH, for the remainder of the sums purportedly due Primus under his contract with MLH to direct" the Movie. MLH, of course, declared bankruptcy in August 1998.

[10] Similarly, cases relied upon by the Lapin respondents which involve Civil Code section 3343, governing damages for fraud involving real property, have no application here.

Civil Code section 1709 specifies that "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." Civil Code section 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." We conclude Primus adequately pled recoverable damages in fraud. Accordingly, we reverse the dismissal as to Primus in favor of the Lapin respondents and remand to the trial court for further proceedings.

B. The Zucker Respondents

As to Primus, the complaint adequately alleges that there was an underlying wrong committed against him by virtue of the Lapin respondents' direct misrepresentations to him. We next address whether the complaint adequately alleges that the Zucker respondents engaged in a conspiracy to defraud Primus. As we will explain, we find that the allegations as to the Zucker respondents were sufficient to survive demurrer.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784 . . . .) By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. (*Ibid.*) In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors.

"Standing alone, a conspiracy does no harm and engenders no tort liability. It must be activated by the commission of an actual tort. '"A civil conspiracy, however atrocious, does not per se give rise to a cause of action unless a civil

wrong has been committed resulting in damage."' (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44 . . . , citing *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 631 . . . .) 'A bare agreement among two or more persons to harm a third person cannot injure the latter unless and until acts are actually performed pursuant to the agreement. Therefore, it is the acts done and not the conspiracy to do them which should be regarded as the essence of the civil action.' (Note, Civil Conspiracy and Interference With Contractual Relations (1975) 8 Loyola L.A. L.Rev. 302, 308, fn. 28.)

"We have summarized the elements and significance of a civil conspiracy: '"The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. . . . In such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity."' [Citations.]" (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra,* 7 Cal.4th 503, 510-511.)

The complaint alleges that Zucker knew of the misrepresentations made by the Lapin respondents regarding Lapin's intention to finance the Movie, and at some point had actual knowledge that these representations were false. Nonetheless, Zucker intentionally conspired to conceal the fact that financing was not assured, as evidenced by his actions in providing the DGA with documents that continued to advance the misrepresentations and further conceal the true state of the financing. These documents also furthered the conspiracy by making MLH a signatory member of the DGA, so that Primus would be permitted to direct the Movie. By making the purported misrepresentations to the DGA, Zucker intended to and did induce Primus to stay on as the director. In addition, Primus alleges that

the DGA was acting as his agent when Zucker communicated with the DGA, and in fact Zucker intended that the representations made to the DGA would be passed on to Primus. These allegations were sufficient to enable Primus to survive the demurrer brought by the Zucker respondents; the judgment of dismissal as against Primus in favor of the Zucker respondents is therefore reversed. We express no opinion as to whether evidence exists such that Primus could withstand a motion for summary judgment or prevail in a trial on the merits with regard to the Zucker respondents' purportedly conspiratorial conduct.

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I. The Lapin Respondents' Motion for Summary Judgment

Angel Paws alleged that Ecclesine represented to Kalinowski that the Movie had received financing and that Lapin and Lambert would fund the film by at least providing gap financing. On the basis of that representation, Angel Paws agreed to contract with MLH to provide the services of Kalinowski as production designer.

Subsequent to the granting of the demurrers discussed above, the Lapin respondents filed a motion for summary judgment with regard to Angel Paws. Angel Paws filed opposition. The Lapin respondents filed a reply to the opposition.

The court granted summary judgment in favor of the Lapin respondents based on its finding that Angel Paws had presented no evidence, and thus no triable issues of material fact, to demonstrate the Lapin respondents' alleged intent to defraud Angel Paws, or to show that the Lapin respondents knew of Ecclesine's statement to Kalinowski, that they endorsed such statement, or that they agreed to

conspire with Ecclesine in defrauding Angel Paws. "Nothing in the evidence demonstrates agreement among the alleged co-conspirators."

The following facts, which the Lapin respondents asserted were undisputed, are relevant to our discussion here. Kalinowski has no personal knowledge that either Lapin or Lambert authorized Ecclesine to represent to Kalinowski that MLH had obtained full financing for the Movie. Lapin and Lambert never intended to provide financing to entertainment producers from their personal assets, and they never represented to anyone that they could or would do so. They never represented to any person or entity involved in the attempted production of the Movie that Lapin's individual wealth was sufficient to serve as a personal guarantee to a lending institution so that it would lend MLH funds sufficient to produce the Movie, or that Lapin ever would extend his personal guarantee for such a loan, under any circumstances. From approximately May through October 1997, Lapin and Lambert used their best efforts to assist MLH and its four principals in attempting to obtain financing from lenders to produce the Movie.

In September 1997, Lapin and Lambert learned that despite the fact MLH had not yet secured sufficient financing to produce the Movie, MLH was proceeding with preproduction. Pritchard explained that the producers had agreed to advance sufficient funds for preproduction. Neither Lapin nor Lambert ever authorized MLH, Pritchard, Ecclesine, Dodson, or Wakefield to make any representations on Lambert, Lapin, Century Entertainment, or E2K's behalf that MLH had, in fact, obtained the necessary financing to produce the Movie. The Lapin respondents did not know that Ecclesine was meeting with Kalinowski in August 1997 or that he had made any representations to Kalinowski regarding the status of the financing for the Movie. The Lapin respondents had no involvement in MLH's efforts to hire persons to work on the Movie and had no knowledge of any representations any of MLH's principals made to any potential employees.

The Lapin respondents did not enter into any agreement or conspire with MLH to make any misrepresentations of fact to anyone regarding the status of MLH's financing of the Movie in order to induce any person or entity to provide goods or services to MLH. They never met nor communicated with Kalinowski, and did not encourage or influence MLH in hiring Kalinowski to work on the Movie. The decision to hire Kalinowski when MLH knew it had not secured financing was made solely by MLH's management team. The Lapin respondents were not shareholders, officers, members, or employees of PEI, Empirical, or MLH, and had no ownership rights or decisionmaking authority with regard to MLH. To the extent Ecclesine made any representations to Kalinowski in August 1997, he spoke only on behalf of MLH and its members and management.

In opposition to the motion for summary judgment, Angel Paws contended that the Lapin respondents made representations to the principals of MLH, who relied upon them, and entered into a conspiracy with them and repeated the substance of the representations regarding financing to Kalinowski in a successful effort to convince it to enter into a contract with MLH.

Angel Paws pointed to the following in order to dispute the facts asserted by the Lapin respondents. Primus stated in his declaration: "At the May 8, 1997 Mateo restaurant meeting, David Pritchard, Stan Dodson, Al Lapin, and Peter Lambert communicated to me that Lapin was a wealthy individual who wished to finance the entire project himself." Thereafter, during various meetings with defendants "through their actions and general demeanor, the persons with whom I met, Lapin, Lambert, Pritchard, Wakefield, Dodson and Ecclesine, communicated that financing for the film was in place." Lapin and Lambert intended that their representations relating to the financing of the film be communicated to those who would be hired for the project . . . . In reliance on the representations, "I advised potential employees of MLH and vendors to MLH that the movie had received

financing and that photography was to begin in October of 1997. For example, I had such discussions with Waldemar Kalinowski."

Dodson said in his declaration that Pritchard told him that he had a contract with Lapin indicating that Lapin was using his assets to back the financing of the film. Up to this point he was led to believe that Lapin would use his personal assets to secure the financing with a bank of his choosing and that the film would be "cash flowed" from the proceeds of the loan secured by Lapin. Presales and subsequent revenues from those international licensees (obtained from international licensing rights to the movie) would serve to repay any debt that Lapin was responsible for and would also compensate Lapin and Lambert for profits, if any. As the start date approached, Empirical was eventually told that the actual financing for the movie was not going to come from a combination of Lapin loans and from additional presales, but instead the film was going to be financed solely from the proceeds obtained through presales. Both Wakefield and Dodson were shocked to discover that Lapin was now planning not on using his assets to back the project but that they were going to presale the project in the foreign territories and seek 'gap' financing to cover the budget from one of the banks with whom Lapin and Lambert had relationships. Empirical would have never optioned the screenplay had Pritchard, Ecclesine, Lapin, and Lambert not aggressively assured that their financing of the project was a done deal. Empirical had been had and Dodson and Wakefield felt manipulated and lied to. At this point, Empirical was already financially committed to making the movie, and Dodson had personally, at the urging of Pritchard and Ecclesine, put up money toward the Movie.

"As Witkin explains, 'If [the plaintiff] can show that each [of several defendants] committed a wrongful act or some part of it, e.g., that each made false representations, he has no need of averments of conspiracy. But if A alone made

representations, the plaintiff can hold B and C liable with A only by alleging and proving that A acted pursuant to an agreement (conspiracy) with B and C to defraud. (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 869, p. 311.)

"Accordingly, '[t]he basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act.' [Citations.] The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose. (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784-786 . . . ['a plaintiff is entitled to damages from those defendants who concurred in the tortious scheme with knowledge of its unlawful purpose']; *People v. Austin* [(1994)] 23 Cal.App.4th 1596, 1607 ['without knowledge of the illegal purpose there is no basis for inferring an agreement'].)

"However, actual knowledge of the planned tort, without more, is insufficient to serve as the basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid in its commission. 'The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective.' (*Schick v. Lerner* (1987) 193 Cal.App.3d 1321, 1328 . . . ; see also *Michael R. v. Jeffrey B.* (1984) 158 Cal.App.3d 1059, 1069 . . . ['[m]ere knowledge, acquiescence, or approval of an act, without cooperation or agreement to cooperate is insufficient to establish liability'].) 'This rule derives from the principle that a person is generally under no duty to take affirmative action to aid or protect others.' (1 Levy et al., Cal. Torts, *supra*, Civil Conspiracy, § 9.03[2], p. 9-13.)

"While knowledge and intent 'may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances' (*Wyatt v. Union Mortgage Co.*, *supra*, 24 Cal.3d at p. 785), '"[c]onspiracies cannot be established by suspicions. There must be some

evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense."' (*Davis v. Superior Court* (1959) 175 Cal.App.2d 8, 23 . . . .) An inference must flow logically from other facts established in the action. (See *People v. Austin*, *supra*, 23 Cal.App.4th at p. 1604.)" (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1581-1582.)

The decision in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826 (*Aguilar*) is also instructive. There, plaintiff brought an action for unlawful conspiracy under the Cartwright Act. (Bus. & Prof. Code, § 16720 et seq.) The Supreme Court, in discussing the standard to be used in deciding a motion for summary judgment involving allegations of conspiracy, stated: "On the defendants' motion for summary judgment, in order to carry a burden of production to make a prima facie showing that there is a triable issue of the material fact of the existence of an unlawful conspiracy, a plaintiff, who would bear the burden of proof by a preponderance of evidence at trial, must present evidence that would allow a reasonable trier of fact to find in his favor on the unlawful-conspiracy issue by a preponderance of the evidence, that is, to find an unlawful conspiracy more likely than not. Ambiguous evidence or inferences showing or implying conduct that is as consistent with permissible competition by independent actors as with unlawful conspiracy by colluding ones do not allow such a trier of fact so to find." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 852.)

We begin by noting that apparently there is no evidence that the specific misrepresentation that Lapin was personally financing the Movie was repeated to Kalinowski, or that he relied upon it in contracting to work on the film or continue working for the final week before the production was shut down. The only

representation upon which he relied was the one made by Ecclesine that the film was fully financed.

Kalinowski stated in his declaration: "During my August 1997 meeting with Ecclesine, I told Ecclesine that the budget would have to be increased to do justice to the script and that I did not want to be associated with the production unless it had a sufficient budget. He advised me that the production had sufficient funding for a multimillion dollar budget. Accordingly, I agreed to accept the assignment." "Exhibit 44 has been described to me as the September 15, 1997 [Screen Actors' Guild] information sheet submitted by [MLH]. [It] is consistent with the representations made to me by Ecclesine: that the [MLH] had a budget for the production of [the Movie] of $12,500,000 and that the budget was financed by 'Entertainment 2000.'" "I relied on Pritchard's representations of October 10, 1997 [that financing offers were on the table and a new deal would be closed] in deciding to continue to work during the next week."

Kalinowski was questioned at deposition about his conversation with Ecclesine. The following exchange occurred: "Q. [D]id you have any discussion of whether financing was in place for the movie? [¶] A. Yes. I was told that this was a movie with Robert De Niro, Mark Wahlberg, that the total budget for the film is in the $12 million range. [¶] Q. And did they tell you whether financing had been secured at that point in time? [¶] A. Yes. [¶] . . . [¶] Q. And what did Steve Ecclesine tell you with respect to whether the financing was secured for the movie? [¶] A. Basically, he said that they have, on the basis o[f] the two stars that they have signed, which is, by the way, a standard phrase used in the industry. []We have Robert De Niro and Mark Wahlberg, and we have the financing in place. We're starting the movie in three weeks[] or four weeks. I don't remember exactly what it was. I think that they told me the actual start date that they had to accomplish in order to take advantage of the money that they had raised. [¶]

Q. So if I'm understanding what you're saying correctly, Ecclesine represented to you that the $12 million in financing was already in place? [¶] A. I can't say for sure that he represented that the $12 million was in place. What he told me is that it's a $12 million film with majority of the money in place based on the cast and the script, but I can't really tell you a number of what -- because I believe that he did say an actual number, but I don't know exactly what it might have been."

At the time the statements were made to Kalinowski that financing was in place, the undisputed evidence is that Ecclesine and Pritchard knew MLH had not concluded a bank financing deal to complete production of the Movie. No evidence was presented, however, that Lapin, Lambert, Ecclesine, and Pritchard agreed that, in order to continue to pursue the fraudulent scheme allegedly launched by Lapin and Lambert, Ecclesine and Pritchard would assure everyone that financing was in place. The evidence may support that the interested parties, including Pritchard and Ecclesine, were struggling to keep the project afloat and in so doing made misrepresentations, but it does not demonstrate that they intentionally agreed to a scheme by which to do so in concert with the Lapin respondents.

Angel Paws was required to offer evidence that Ecclesine knew about the Lapin respondents' alleged scheme to defraud Angel Paws into agreeing to work on the film by saying the film was financed, that they intentionally joined the Lapin respondents in this scheme and that such intentional joinder was done for the purpose of injuring Angel Paws. The facts demonstrate that Ecclesine made misrepresentations to Angel Paws in order to persuade Kalinowski to act as production designer, but not that there was any agreement, tacit or otherwise, that he would do so to further the alleged scheme of the Lapin respondents. Even acknowledging that evidence exists that Lapin misrepresented his intention and ability to personally fund the Movie, there is no evidence that Ecclesine

intentionally agreed to aid in the wrongdoing, or on the other hand, that the Lapin respondents knew of Ecclesine's statements or endorsed them. As such, we conclude that summary judgment was properly granted in their favor.

II. The Zucker Respondents' Motion for Summary Judgment

The Zucker respondents filed a motion for summary judgment on the ground that no evidence existed to demonstrate they engaged in a conspiracy to defraud Angel Paws. Angel Paws filed opposition, contending that the Zucker respondents conspired with the other defendants to commit fraud, and their participation in the conspiracy could be demonstrated by documents they sent to the Screen Actors Guild (SAG) and the DGA. The Zucker respondents filed a reply to the opposition.

The trial court granted summary judgment in favor of the Zucker respondents, finding that Angel Paws failed to put forward evidence raising a triable issue of fact as to the Zucker respondents' engaging in a conspiracy to commit fraud.

In its separate statement of facts, the Zucker respondents set forth the following facts as being undisputed, supported primarily by their own declarations. The Zucker respondents never conspired with Pritchard, Ecclesine, Lapin, Lambert, Wakefield, or Dodson to make any misrepresentations regarding the film financing to any person or entity. They never authorized those individuals to make any representation on their behalf. Specifically, they did not authorize those individuals to make any representation to any person that the necessary financing for the Movie had been secured.

The Zucker respondents did not authorize Ecclesine to make any representation to Angel Paws or Kalinowski, on their behalf, that the necessary financing for the Movie had been secured. The Zucker respondents never met or communicated with Angel Paws or Kalinowski and had no knowledge in 1997 of what Kalinowski did in connection with the Movie. The decision to hire Kalinowski was not made by the Zucker respondents. The Zucker respondents were not aware that Ecclesine met with Kalinowski in August 1997, or that Ecclesine made any representations to him regarding financing. Ecclesine was not authorized to make any representations to Kalinowski on behalf of the Zucker respondents. Finally, the Zucker respondents had no knowledge of, and did not authorize or consent to, Pritchard stating to the production crew that full financing for the Movie would be forthcoming within a week or that MLH would pay crew members a bonus for continuing to work.

Angel Paws opposed the motion for summary judgment, asserting that the central factual issue is whether the Zucker respondents were simply legal counsel to Pritchard and MLH, or whether "they were active participants in a scheme to mislead the persons and entities with which MLH did business and which MLH employed to give the totally false impression that MLH had or would have the ability to pay for the services rendered to it by its employees."[11]

Specifically, Angel Paws pointed to these facts: On September 12, 1997, Zucker wrote a memorandum to his file noting that MLH "may be unable to borrow sufficient moneys to produce the picture." He stated in another

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[11] The Zucker respondents were retained by Pritchard and Ecclesine to render legal services in connection with the Movie. Specifically, on May 27, 1997, Pritchard and Ecclesine agreed to a contract with the Zucker respondents, granting the latter a percentage interest in the film. Lowy & Zucker prepared the operating agreement for MLH, dated June 30, 1997.

memorandum dated September 16, 1997, that Pritchard "informed me that he had not shut down the production and that he was going to try to sell the film 'domestically' to finance the picture, as . . . opposed to waiting and hoping against hope that the film would generate the production funds from foreign presales." In a memorandum to Pritchard dated September 19, 1997, Zucker stated: "You informed me of the potential of not having the funds to finance the picture, and I would like to do everything I can do [to] minimize [MLH's] liability by, for example, not sending out formal contracts to the actors, avoiding verbal misrepresentations, etc."

Angel Paws presented the declaration of Elizabeth Moseley, a business representative for SAG. Attached to the declaration is a "theatrical information sheet" sent to SAG by Zucker on behalf of MLH around September 15, 1997. It states that the Movie had a total budget of $12,500,000; that the budget was financed by E2K; and that the film had a distribution agreement with "WB" (Moseley declares this refers to Warner Brothers), that included television.

Angel Paws also presented the declaration of Beverly Ware, an attorney for the DGA. Attached to her declaration is a letter sent by Lowy & Zucker to the DGA, dated August 12, 1997, enclosing the option agreement entered into by MLH on the one hand, and the screenwriters and Primus on the other hand, regarding rights to the underlying story. The letter states that the agreement is the sole documentation of MLH's ownership of the rights to the story, and that more documentation would be provided as it existed in the future.

Also attached to the Ware declaration is a letter received by the DGA Signatories Department on August 18, 1997, sent by Lowy & Zucker. Enclosed with the letter was a Company Information Form that the DGA requires of proposed new signatories with the DGA. Ware stated: "Before one of our members is permitted, for example, to direct a film for a newly formed

corporation, that entity is required to submit a Company Information Form." In submitting the form, the DGA understood that MLH was representing (among other things) that it would sign the DGA agreements covering film work; that the budget for the proposed Movie was $8,500,000; that the director would be Barry Primus; that the start date for photography was October 21, 1997; that the financing sources for the $8,500,000 budget were PEI (50 percent) and Empirical (50 percent); that the Completion Bond Company was Film Finances, Inc; that Robert De Niro had a security interest in the intellectual property rights to the film; that MLH owned "the rights to the underlying material"; and that the attorney for MLH was Andrew Zucker of Lowy & Zucker.

Ware also stated that the DGA received a "Security Agreement" on August 18, 1997, which was executed by the parties thereto on or about that date. Its purpose was for MLH to grant the DGA a security interest in, inter alia, the MLH ownership of the copyrights to the underlying material used for the film.[12] MLH warranted in the security agreement that it was "the holder and owner of all Copyright in and to the Literary Property."

Angel Paws does not contend that the Zucker respondents made any misrepresentations directly to it. Instead, it contends that the foregoing evidence

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[12] Therein, MLH "specifically represents, warrants and covenants that '[e]mployer shall, upon demand by the Guild, deliver to the Guild satisfactory evidence that the Picture and underlying literary rights have been duly registered in the United States Copyright Office . . . '; that '[e]mployer shall, upon demand by the Guild, execute and deliver to the Guild a Mortgage and Assignment of Copyrights, upon the usual form used by the Guild, sufficient to constitute, when recorded in the United States Copyright Office, a first and prior lien upon the Copyrights . . . '; that '[e]mployer represents and warrants that except as stated herein, Employer is the holder and owner of all Copyright in and to the Literary Property' . . . ; that '[e]mployer covenants that the Guild has and will have, at all times during the term of this Security Agreement, a first priority security interest in all of the Collateral except for the security interests or liens disclosed . . . .'"

and the totality of the circumstances demonstrate that the Zucker respondents conspired with the other defendants in that they endorsed statements made by Ecclesine and Pritchard that the film was fully financed.

The memoranda detailed above, authored by Zucker, indicate that Zucker was well aware at least by September 1997 that financing for the Movie was not assured, and indeed the project was in crisis due to lack of funding. In that regard, Zucker offered Pritchard advice to enable MLH to minimize its liability, for example, by avoiding making misrepresentations or signing contracts. Nothing in these memoranda provides evidence that Zucker was colluding with the other defendants in representing that the Movie was fully financed.

Even when viewed in combination with the documents forwarded by Zucker to SAG and the DGA, an inference of participation in a conspiracy does not arise. The documents merely state the proposed budget for the Movie and the source of financing as being either E2K, or the member corporations of MLH; they do not affirmatively represent that financing had been formally secured in the stated amount of the budget. The documents demonstrate that the Zucker respondents endeavored to establish chain of title for the rights to the underlying story, such that MLH could become a signatory member of DGA and the production could continue to proceed, but the actual documentation of chain of title merely consisted of the option agreement. Indeed, MLH had the right to exercise its option to purchase the rights to the material, and could do so at any time as long as it secured financing for the Movie. The evidence makes clear that all of the defendants sought to keep the production moving forward, in order to get the Movie made. The contention by Angel Paws that the Zucker respondents kept the production moving forward, by endorsing and advancing the producers' misrepresentations, in order to get the Movie made, but also to advance the producers' fraudulent

purposes and cause harm to Angel Paws, is simply not supported by adequate evidence.

All of the proffered evidence is readily explained by describing the Zucker respondents as actively seeking to advance the interests of their client, MLH, in achieving production of the Movie. They sought to satisfy the DGA requirements that MLH become a signatory member so that Primus could direct the film, as well as the SAG requirements. The evidence does not inevitably raise the inference that the Zucker respondents had knowledge that Pritchard and Ecclesine or others were falsely representing that the film was fully financed, that the Zucker respondents endorsed the making of misrepresentations, or that they affirmatively agreed to aid in any wrongdoing. To paraphrase the court in *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th 826, 852, the evidence does not show that the existence of a conspiracy was more likely than not. The Zucker respondents' conduct was as consistent with their engaging in permissible client advocacy as with engaging in an unlawful conspiracy. As such, we conclude that summary judgment was properly granted in their favor.

DISPOSITION

The judgment of dismissal in favor of the Lapin respondents as to Parmet and Kingston is affirmed. The judgment of dismissal in favor of the Zucker respondents as to Parmet and Kingston is also affirmed. The judgment of dismissal in favor of the Lapin respondents as to BPI/Primus is reversed, as is the judgment of dismissal in favor of the Zucker respondents, and the matter remanded to the trial court for further proceedings as to BPI/Primus only. Costs on appeal are awarded to respondents with respect to the appeal brought by Parmet and

Kingston; BPI/Primus is awarded its costs on appeal against both the Lapin and Zucker respondents.

The summary judgment in favor of the Lapin respondents and the summary judgment in favor of the Zucker respondents, as against Angel Paws, are affirmed. Costs on appeal are awarded to the Lapin and Zucker respondents and against Angel Paws.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURRY, J.

We concur:

EPSTEIN, Acting P.J.

HASTINGS, J.